

REGULATORY GUIDE - SECURITY OF PAYMENT REFORMS (NON-TRUST PROVISIONS)



1.0 INTRODUCTION

1.1 PURPOSE AND SCOPE

Amendments to the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act) that commenced on 1 October 2020 introduced a suite of new security of payment offences and corresponding penalties for the construction industry. The Queensland Building and Construction Commission (QBCC) is responsible for regulating the security of payment offences in the BIF Act, including investigating, auditing and enforcing compliance.

This regulatory guide has been produced to inform parties to construction contracts in Queensland about the QBCC's approaches to identifying and responding to the security of payment offences in chapter 3 of the BIF Act.

The offences covered by this guide include:

- Claimant fails to provide a supporting statement with payment claims when required (s75(7) BIF Act – maximum of 100 penalty units)
- Claimant provides false/misleading information in supporting statement or in responding to a request for information about a higher party (s97F(3), s200D BIF Act – maximum of 100 penalty units)
- Respondent fails to give a payment schedule within the prescribed timeframe, if not paying in full by the due date (s76(1) BIF Act – maximum of 100 penalty units)
- Respondent fails to pay amount in payment schedule by progress payment due date (s76(3) BIF Act – maximum of 100 penalty units)
- Respondent fails to pay adjudicated amount (s90(2) – maximum of 200 penalty units)
- Failing to comply with payment withholding request (s97C(2) BIF Act – maximum of 50 penalty units)
- Claimant fails to release a charge over property when required (s100D BIF Act – maximum of 100 penalty units)
- Failing to give required notices or documents to the QBCC (commissioner or registrar) as and when required (s88(6), new s90(3), s97(3), s189A(3) – various offences with maximum penalties between 20 and 100 penalty units)
- Failing to give required notices/information to another party as and when required (s97B(4), s97B(5), s97C(5), s97F(2) BIF Act – various offences with maximum penalties between 20 and 50 penalty units).

This document contains general statements based on typical circumstances. Where exceptional circumstances exist the QBCC may depart from its usual processes.

1.2 NOT COVERED BY THIS GUIDE

This guide does not address project bank account or statutory trust obligations. A separate regulatory guide will be developed by the QBCC to address statutory trust (i.e. project trust and retention trust) obligations and offences.

2.0 REGULATORY APPROACH – DETECTING NON-COMPLIANCE

2.1 DETECTION METHODS

There are three ways in which non-compliance with security of payment obligations are likely to come to the attention of the QBCC.

- (i) Reactive investigation following receipt of complaints or other incoming information – On receipt of a complaint or other incoming compliance information (i.e. information shared by another agency indicating non-compliance), the QBCC may investigate to determine whether or not the alleged offender has complied with their obligations.
- (ii) Proactive investigation of suspected non-compliance – The QBCC may initiate proactive investigations when a person has an active, usually time-constrained, obligation to do something or provide something that the QBCC has visibility of.
- (iii) Proactive audit under an approved audit program – The QBCC can check compliance more broadly under an approved audit program. The QBCC will develop and publish approved audit programs as required to check compliance with security of payment obligations.

2.2 KEY FACTORS IN DETERMINING DETECTION METHOD

In choosing which detection method it will generally employ, the QBCC considers the factors outlined below.

Potential impact of breach

The QBCC considers an offence's potential impact on other persons when deciding which regulatory approach to use. The greater the potential impact an offence has on another party, the more likely it is that the QBCC will investigate such offences proactively.

Likelihood of breach

The QBCC considers the likelihood that a provision will be breached when determining the resourcing and effort expended on investigating such breaches. For example, a requirement that only applies under a rarely used payment dispute option will receive less proactive attention than a requirement that applies across a large cohort and is therefore more likely to be breached.

QBCC's visibility of conduct

In determining whether to take a proactive approach to compliance, the QBCC considers who an obligation is toward and the QBCC's level of visibility of the conduct.

In many cases the QBCC will not have visibility of whether a person is meeting their obligations owed to another party without being given information or evidence about the person's compliance by a complainant or another agency. This is because not all obligations require a person to notify the QBCC.

As such, a breach of an obligation to another party (such as a respondent's obligation to give a claimant requested details of a higher party) may be investigated on a complaint-driven basis, without the QBCC proactively looking for possible non-compliance.

An exception to this will be for payment claim and supporting statement requirements where the QBCC may conduct an approved audit program. Persons selected to be audited will be required to provide documents that relate to the obligations being reviewed.

2.3 REGULATORY APPROACH FOR SECURITY OF PAYMENT OBLIGATIONS

The table below outlines potential regulatory approaches for detecting non-compliance with the different security of payment compliance obligations.

COMPLIANCE OBLIGATION	REACTIVE APPROACH (complaints received or other incoming information)	PROACTIVE INVESTIGATION (obligation with direct QBCC oversight)	PROACTIVE AUDIT UNDER APPROVED AUDIT PROGRAM (broad compliance check)
Payment claim supporting statements, payment schedules and progress payments	Yes	No	Yes
Obligations to provide information/ documents/ notification to the QBCC	No	Yes	No
Obligations to provide information/ documents/ notification to another party or comply with another party's request (e.g. payment withholding)	Yes	No	No

2.4 APPROVED AUDIT PROGRAM

The QBCC intends to commence its first approved audit program under the BIF Act in late 2020, auditing QBCC licensees to establish levels of compliance with obligations to pay a payment claim in full by the due date or to issue a payment schedule.

Cohorts of licensees will be selected by the QBCC for audit on either a risk basis or from a random sample. Licensees selected for an audit will be asked to provide copies of documents from a defined period of time, including (but not necessarily limited to) payment claims received, payment schedules issued, evidence of payment and copies of relevant contracts. Where non-compliances are identified, the QBCC will respond applying the principles set out in the next section of this guide.

3.0 REGULATORY RESPONSE

If, following an investigation or audit, the QBCC determines that enforcement action is warranted, it will take a proportionate response that it expects is likely to return the non-compliant party to compliance and serve as a deterrent to future breaches.

3.1 KEYS FACTORS IN DETERMINING REGULATORY RESPONSE

If a breach is verified, some of the factors that the QBCC will take into account in determining the appropriate enforcement response include:

- (i) **State of mind** – Is there evidence of an intention to avoid complying with the requirements? This includes evidence of hiding information from the QBCC or being uncooperative with an audit.
- (ii) **Seriousness** – Has the non-compliance caused loss to another party and if so how much?
- (iii) **Scale** – How many breaches have occurred or how long has the offender been in breach without remedying?
- (iv) **Systems** – Has the offender failed to put in place adequate business processes (having regard to the size and operations of the offender entity) to ensure compliance with their obligations?
- (v) **Any other relevant matters** – Each situation is unique and the QBCC will consider all relevant factors in determining its regulatory response.

The table below sets out some common responses to non-compliance and some circumstances that may apply for each response. It should be noted that the circumstances detailed for each regulatory response are included for guidance only and are not intended to be applied inflexibly.

Not all the factors listed in the ‘Circumstances’ column are required to be present to indicate that the corresponding response is appropriate. Regulatory responses are determined on a case-by-case basis.

RESPONSE	CIRCUMSTANCES
Education/informal warning (verbal and/or written)	Action that may be reasonably attributed to human error or inadequate understanding of a novel or complex matter; no loss to affected parties.
Reprimand (s74D(e) QBCC Act) for licensees only	Careless or negligent conduct; multiple previous warnings; some loss to affected parties; breach easily remedied.
Penalty infringement notice (PIN)	Wilful or careless conduct; offence is a prescribed infringement notice offence; low level offending; breach can be verified objectively; some loss to affected parties; one or more previous warnings for same offence.
Disciplinary penalty (s74D(d) QBCC Act) – up to an amount equivalent to 200PUs for individuals; up to 1000PUs for corporations for licensees only	Wilful or negligent conduct; moderate breach; loss to affected parties or repeated non-compliance.
Imposed licence condition (s74D(e) QBCC Act) for licensees only	Failure to have proper systems; repeated non-compliance; likely to be remedied with oversight by the QBCC.

RESPONSE	CIRCUMSTANCES
Licence suspension (s74D(e) QBCC Act) for licensees only	Wilful or negligent conduct; significant non-compliance; loss to affected parties; likelihood of further non-compliance and ongoing loss.
Licence cancellation (s74D(e) QBCC Act) for licensees only	As for suspension, but failure to rectify breaches following suspension or low likelihood that offender will operate in compliance in the future.
Prosecution	Wilful conduct; significant non-compliance; loss to affected parties or repeated non-compliance.

3.2 OTHER CONSIDERATIONS

It is expected that the level of knowledge about the new requirements and offences will improve over time. As such, it is considered that offences that occur within the first 12 months are more likely to be attributed to error or insufficient understanding, while later breaches may exhibit a greater degree of negligence or willfulness.

While parties should make every effort to understand the new laws and comply with their obligations, the QBCC may consider taking an educational approach to responding to non-compliance in the familiarisation period where insufficient understanding is indicated. An example of an educational approach could be providing resources/support to ensure that the non-compliant party is aware of and understands their obligations. This may be reinforced with a follow up audit at a later date to check for further non-compliance.

If the non-compliance appears to be more serious than an inadvertent breach, however, or if the breach causes material financial loss to another person, the QBCC will take stronger enforcement action. It may also do this if a past offender repeatedly breaches their requirements even after the QBCC has taken an educational approach.

Available QBCC resources will also determine the compliance activities and level of risk targeted in its compliance programs.

Need more information?

Visit qbcc.qld.gov.au or call us on 139 333.

